UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

MOUNTAINEER EXCAVATING COMPANY, INC.

Employer

and

Case 6-RC-11778

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 132, AFL-CIO[1]

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Leone P. Paradise, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.[2]

Upon the entire record[3] in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The names of the Employer and of the Petitioner appear as amended at the hearing.

[2] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 l4th Street, N.W., Washington, D.C. 20570-000l. This request must be received by the Board in Washington by March 30, 2000.

[3] Neither the Employer nor the Petitioner filed a brief in this matter.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of all full-time equipment operators employed by the Employer; excluding all shop personnel, laborers, truck drivers, supervisors, office clerical employees as defined in the Act, and all other employees. The Employer contends, contrary to the Petitioner, that the petitioned-for unit is inappropriate as it is too limited in scope and that the only appropriate unit must include all full-time and regular part-time equipment operators, mechanics, laborers and truck drivers employed by the Employer; excluding office clerical employees and guards and supervisors as defined in the Act, and all other employees. In addition, the Employer, contrary to the Petitioner, would exclude equipment operators Billy J. Rayl and Larry Taylor on the basis that they are supervisors within the meaning of the Act. The Petitioner has indicated that it is unwilling to proceed to an election in any unit which includes other than equipment operators sought by the petition. There are four employees in the petitioned-for unit, and 11 employees in the unit the Employer contends is appropriate. There has been no history of collective bargaining for any of the petitioned-for employees within the last 15 years.

The Employer, a West Virginia corporation, with its sole facility located in Moundsville, West Virginia, is engaged in the maintenance, excavation and site development of coal mines and acid mine drainage plants.[4] Approximately 90 percent of the work performed by the Employer is performed for Consolidation Coal Company, primarily at its coal mines in the geographical area known as the Ohio Valley in West Virginia, Ohio and Pennsylvania.

[4] An acid mine drainage plant is a facility where acidic water, which is collected from coal refuse piles, is mixed with lime to control the PH level of the water.

The Employer's President, Thomas Quinn, is responsible for overseeing all of the operations. Thomas Quinn calculates and submits bids on all jobs, schedules the work, and is the final decision maker in the hiring, firing and disciplining of employees. Currently, Quinn[5] spends about half of his time visiting various job sites. Approximately one-quarter of his time is spent in the Employer's office, which is located in the basement of Quinn's home. Quinn indicated that due to health problems he has reduced his work schedule to approximately a 75 percent schedule. Engineer Kevin Quinn, who is the son of Thomas Quinn, assists his father in bidding and scheduling work. Like his father, Kevin Quinn will visit jobsites and assist in completing the work to be performed, if necessary. The record reveals that Kevin Quinn performs much of his work in the office, working on the Employer's computer.[6]

The Employer employs four equipment operators,[7] four truck drivers,[8] one laborer, [9] and two mechanics.[10] The Employer's shop is located across a creek from the home of Thomas Quinn.[11] As stated above, the Employer's office is located in the basement of Thomas Quinn's residence. The two mechanics spend 80 to 90 percent of their time in the Employer's shop, repairing and maintaining the Employer's trucks and equipment. If necessary, a mechanic will go into the field to repair equipment or change oil. As needed, the mechanics will also seed the ground or run the pumps at the acid mine drainage plant.

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[5] Unless otherwise indicated, all references to "Quinn" refer to Thomas Quinn.

[6] As stated at the hearing, the Employer does not seek to include Kevin Quinn in the unit being proposed by the Employer. Likewise, the Employer does not seek to include Betty Quinn or Cynthia Weedabush, the wife and daughter of President Thomas Quinn, respectively. Both Betty Quinn and Weedabush work in the office handling payroll.

[7] The equipment operators are Billy J. Rayl, Larry R. Taylor, Timothy Brown and Dennis Henderson.

[8] The truck drivers are David C. Dempsey, Donald E. Thomas, Jack L. Crow and James F. Littleton.

[9] The laborer is Todd Hill.

[10] The mechanics are Wayne Lightner and Zane Newman.

[11] The residence of Quinn and the Employer's shop are located on sixty acres of land.

The Employer excavates and performs site development at coal mines. This work includes excavating and developing land for the construction of airshafts[12], and filling the airshafts when the shaft is no longer needed. To develop land for the construction of an airshaft, the Employer levels the ground, repairs slips,[13] and builds a sediment pond. The Employer then clears right-of-ways and creates emergency escape hoists.[14] The Employer's employees also clean slurry[15] ponds which are created from the coal cleaning process. In cleaning the ponds the Employer's operators utilize an excavator to extract slurry and place it in a dump truck that is driven by one of the Employer's truck drivers. The record indicates that certain ponds are too large to be cleaned utilizing an excavator. To clean such ponds, the Employer uses a dredge.[16] The dredge is operated by Todd Hill.[17] Whether extracted by excavator or dredge, the load is hauled away and dumped on a refuse pile. Finally, the Employer performs reclamation of ground which has been disturbed in the site development process. Reclamation of the land involves grading the land to level the gob pile,[18]hauling refuse away from the site, filling ditches with stone, and finally topping the graded land with two feet of dirt before seeding the ground.

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[12] The actual construction of the airshaft is not performed by the Employer.

[13] A slip is an area of unstable ground which occurs when the layer of clay underlying rocks becomes wet.

[14] The hoist is an escape route built a distance from the shaft where miners can be lifted out of the mine in case of fire or other emergency.

[15] Slurry, a semi-solid material, is a byproduct of the coal cleaning process.

[16] The dredge or "mud cat" is a machine which runs through the pond on a cable. The machine has a tilling device on the front with a pump to remove solids from the pond.

[17] Although he admitted that the operation of the dredge is boring, readily learned, and that none of the equipment operators ever operate the dredge, Quinn would not characterize the operation of the dredge as unskilled and would likewise not state that Hill's job classification is laborer. However, there is no other individual employed by the Employer who occupies this classification. The record establishes that Hill operates the dredge about one-half of his work time. When the ponds freeze, Hill will perform carpentry work, laborer work and seeding. With respect to the operation of any other equipment, the record indicates that the extent of Hill's involvement is limited to moving the equipment if necessary.

[18] The gob pile is the rock and stone left after the coal is cleaned and extracted from the mine.

When a mine is completely depleted of coal it must be closed. The operators fill bore holes with concrete and then fill the shaft with rock and dirt. Once started, this type of work must be performed continuously around the clock until the job is completed because of the danger that the shaft could explode if methane gas filled the shaft.[19]

As noted, the Employer's business operations also involve performing maintenance work for its customers. If necessary, the Employer will perform all maintenance functions required by the customer, such as plowing roads and right-of-ways to keep them free of snow. The record indicates that two of the operators plow the snow.

The record indicates that the operators are generally organized into two work crews, each consisting of two operators. In the course of a day, the required number of drivers will also report to the job site. For a job involving the filling of a mineshaft, the operators will work two twelve hours shifts, from 7:00 a.m. to 7:00 p.m. and from 7:00 p.m. to 7:00 a.m. The truck drivers also work at this site but generally their hours are from 11:00 a.m. to 7:00 p.m. The drivers will initially erect a silt fence around the site. They then haul rock to the site and dump it. One operator will push the rock over to the shaft with the bulldozer while the other operator will fill the shaft with rock using an excavator. Concrete is then poured into the shaft and finally an operator fills the shaft with dirt, again using an excavator.

With respect to the operation of the bulldozers and the excavators by any employees in the job classification of truck driver, laborer or mechanic, the record establishes that the truck drivers may operate a spare dozer in an unusual situation such as if a truck needed to be pulled from a pond. The drivers do not otherwise operate equipment and do not perform any equipment operating duties at the coal mine sites. The Employer's two mechanics will load material into trucks at the Employer's shop utilizing a backhoe but do not operate equipment at the coal mine site. When they have no driving duties to perform, the truck drivers and the

[19] As of the hearing, the Employer's work consisted of closing seven airshafts, repairing one slip, and monitoring the acid mine drainage plant and the pumps at Shoemaker Mine. Quinn also stated that the Employer expects to receive two pond cleaning jobs.

laborer will help seed, erect silt fence or wash their trucks. All of the operators, however, possess Class A CDL's[20] and will drive the Employer's dump trucks and low boys when there is no operating work to be performed.[21] Neither the mechanics nor the laborer possess a CDL license.

All employees receive the same health coverage and participate in the Employer's profit sharing plan.[22] All employees may take unpaid vacation if approved by Quinn. All employees will receive a cash bonus if the Employer has a profitable year. It appears that the amount of the bonus is not uniform and the amounts are determined solely by Quinn. Shop employees receive a one-half hour unpaid lunch break. Operators generally work through their shift and may eat while working. The operators are thus paid for all time shown on their time card. All employees are hourly paid, with the exception of mechanic Zane Newman who is salaried.[23] The operators earn between $13.00 and $16.00 per hour. Rayl and Taylor, who were hired on July 1, 1985, and April 1, 1987, respectively, each earn $16.00 per hour. Timmy Brown, whose hire date is April 1, 1989, earns $15.00 per hour. Dennis Henderson, whose hire date is April 1, 1991, earns $13.00 per hour. The other mechanic is paid $8.50 per hour. The rest of the employees earn between $9.00 and $9.50 per hour.

The record indicates that the operators employed by the Employer either had experience operating heavy equipment before being hired or learned this skill on the job.[24] It appears that

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[20] CDL refers to a commercial driver's license which permits truck drivers to drive trucks over a certain gross weight limit.

[21] The record contains evidence that on New Years Day several drivers and three of the operators drove the Employer's dumptrucks. On that day, no heavy equipment was in use. The equipment operators receive their regular wage rate when they drive trucks.

[22] The only exception to participation in the profit sharing plan is that Zane Newman does not participate in this plan because many years ago the Employer purchased a life insurance policy for Newman. The record does not contain further information regarding this policy.

[23] Newman earns $600 per week.

[24] The record does not reveal which operators had prior experience or the extent of that experience.

the only formal training required by the Employer is 24 hours of training mandated by the federal government for all individuals who work on coal property, whether working as an equipment operator or as a truck driver. There is no evidence that the Employer conducts training classes on any specific skills. The record contains an example of one employee being hired as a truck driver and then becoming an equipment operator several years later.

It is well established that in determining appropriate units for collective-bargaining purposes, the Act requires only that a unit be "appropriate" so as to insure to employees in each case the fullest freedom in exercising the rights guaranteed by the Act. There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Morand Brothers Beverage Co., et al., 91 NLRB 409, 418 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). See also Omni International Hotel, 283 NLRB 475 (1987) and Capital Bakers, Inc., 168 NLRB 904, 905 (1967). In addition, the unit sought by the Petitioner is always a relevant consideration, and the Board first considers the appropriateness of the unit sought by the Petitioner. Overnite Transportation Company, 322 NLRB 723 (1996).

In determining the appropriateness of the petitioned-for unit in this case, I conclude, for the reasons set forth below, that the equipment operators constitute an identifiable and functionally distinct group with common interests distinguishable from employees in the truck driver, laborer or mechanic classification.

The record herein establishes that employees in the operator classification are employed because of their ability to operate the heavy equipment. Thus, their work requires that they possess a high degree of skill. Moreover, the operators are paid at a substantially higher wage rate than the truck drivers and laborer, who perform less skilled work.

While the mechanics appear to be skilled employees, the work performed by the mechanics in this case is not so functionally related to that of the equipment operators as to require their inclusion, contrary to the Petitioner's desires, in the unit found appropriate herein. Thus, the record establishes that the mechanics report to the shop and perform the vast

majority of their duties there, while the equipment operators report directly to and work at the various jobsites. The mechanics have little contact with, and do not interchange with, the equipment operators. The mechanics work different hours and have an unpaid lunch break. The record also reveals that, unlike the equipment operators, one mechanic is paid on a salaried basis[25] and the other mechanic is paid at a substantially lower wage rate than the equipment operators. Accordingly, I find that the mechanics do not share such a community of interest with the equipment operators as to require their inclusion in the unit found appropriate herein. See Novato Disposal Services, Inc., 330 NLRB No. 97 (2000).

The equipment operators also work different hours than the other employees, and their work in filling in the shafts at coal mines must be done on a continuous basis, thereby requiring that the operators work in two two-man teams. Because of the nature of their work, operators do not take a one-half hour unpaid lunch break; rather they work throughout the day and are paid for all the time reported on their timecards. Operators will at times drive trucks[26], but none of the other employees operate heavy equipment at the coal mine site as they do not possess the required skills.

In view of the foregoing, noting particularly that operators are the only employees who possess the specialized skills to operate heavy equipment at the coal mine sites, that the petitioned-for unit need only be an appropriate unit and that the Petitioner is not seeking to represent the Employer's employees on a broader basis, I find that it has not been shown that the lines of separate functional identity of the Employer's equipment operators have been so blurred as to preclude a separate operator unit. See New Enterprise Stone & Lime, Inc., 172 NLRB 2157 (1968) and Del-Mont Construction Company, 150 NLRB 85 (1964).

[25] I note that Newman's salary, if computed as an hourly rate, appears to be within the range of wage rates paid to the equipment operators. However, for reasons not explicitly set forth in the record, it appears that Newman has a separate status by virtue of his being the only salaried employee and the only employee for whom the Employer purchased an insurance policy.

[26] Such secondary assignments outside the operator classification requiring occasional driving duties do not require the inclusion of other employees with the operators. See Dick Kelchner Excavating Co., 236 NLRB 1414 (1978).

Accordingly, based on the above and the record as a whole, I find that the petitioned-for equipment operators constitute an appropriate unit.

There remains for consideration the status of Billy J. Rayl and Larry Taylor who, as previously indicated, the Employer, contrary to the Petitioner, would exclude as supervisors within the meaning of the Act.

As stated above, Rayl and Taylor are equipment operators. The record establishes that neither Rayl nor Taylor have the authority to hire, lay off, recall, adjust grievances, discipline, grant benefits or raises to other employees or to effectively recommend that such action be taken.[27] In addition, there is no record evidence that Rayl and Taylor have the authority to transfer, suspend, promote or discharge employees.

Rayl and Taylor have been employed by the Employer for 15 and 13 years, respectively. Each earns $16.00 per hour. Rayl and Taylor each usually work in a team with one of the other less experienced operators. However, at times Rayl and Taylor will work together, or they may work alone on a job.

With respect to the factors of responsible direction and assignment of work to employees, the record indicates that when the Employer is awarded a bid job, Quinn will give the blueprints and plans to Rayl. Rayl will go to the jobsite and "build the site". In doing so, Rayl will advise Quinn which operators he wants to work with[28] and what equipment is required. Quinn then determines the hours to be worked by the truck drivers, based on his assessment of when they will be needed to perform their duties. Inasmuch as Quinn may not go to the jobsite unless his presence is required, Rayl will direct employees working on site. The record establishes that Quinn relies on Rayl in this regard because Rayl has been employed for many

[27] The record indicates that all employees can recommend individuals known to them for employment with the Employer.

[28] The record reflects that Rayl does not independently determine the composition of the crews. On jobs other than the filling of air shafts, employees decide as a group whether they wish to work four ten-hour days. The record also indicates that, for a job beginning the day after the close of the hearing in this matter, the equipment operators decided among themselves how they would be paired in teams.

years and is experienced at the work the Employer performs. Rayl is provided with a company truck with a cell phone.[29] If questions arise on the job, Rayl will call Quinn or the engineer who works for the coal company. Rayl advises Quinn if overtime is required. Overtime hours need not be pre-approved on certain jobs because the Employer bids these jobs on a "time and material" basis, and therefore the coal company pays whatever number of hours is required to complete the job. In other cases, Rayl will check with Quinn before overtime hours are worked.

With respect to Larry Taylor's alleged supervisory status, the record indicates only that Taylor also "decides how jobs will be performed" and, like Rayl, will "run" certain jobs. The record indicates that Taylor is also an experienced and skilled equipment operator.

The record reveals that, until about one year ago, the Employer had approximately 27 employees. Apparently the business partially shut down and the Employer laid off a substantial number of employees. When the layoffs and subsequent recalls occurred, Quinn decided, without the involvement of anyone else, which employees would be laid off and which employees would be recalled. Likewise, with respect to the annual cash bonuses which the Employer has granted in the past, Quinn alone determines whether a bonus will be granted and further determines what amount each employee will receive.[30]

The Board has been frequently required to resolve issues involving the supervisory status of persons whose status is unclear, and each case turns upon the particular facts involved therein. The United States Supreme Court and the Board have noted that the legislative history of Section 2(11) of the Act reveals that Congress intentionally distinguished between "straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action."

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[29] Operators Taylor, Brown and Henderson each have hand held radios.

[30] The record indicates that no bonus was given for the year 1999 because of a downturn in business. The record further establishes that when bonuses are granted, the bonuses are not uniform among employees.

NLRB v. Bell Aerospace Company, 416 U.S. 267, 280-281 (1974). In order for an individual to be found to be a supervisor within the meaning of the Act, the individual must be vested with more than a title and the theoretical power to perform one or more of the functions enumerated in Section 2(11) of the Act. In addition, it must be shown that such power is exercised with independent judgment on behalf of management, and not in a routine or clerical manner. The Board and the courts have recognized that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1997): Chicago Metallic Corp., 273 NLRB 1677 (1985).

The record herein establishes that while Rayl and Taylor may direct employees in the completion of jobs, both primarily perform the work of equipment operator. While both may be leadmen (although there is no evidence that either of them have this title), neither Rayl nor Taylor have any role in discipline[31] or in the exercise of any independent judgment on behalf of management. While it appears that both Rayl and Taylor are highly skilled individuals with many years of experience, such qualifications, without more, do not constitute supervisory authority. Byers Engineering Corp., supra. It is well established that the party asserting supervisory status has the burden of proving such status exists. Tuscon Gas & Electric Company, 241 NLRB 181 (1979). In this case that burden, which rests with the Employer, has not been met.

Based on the above, and the record as a whole, I find that Billy J. Rayl and Larry Taylor are not supervisors within the meaning of the Act, and accordingly I shall include Billy J. Rayl and Larry Taylor in the unit found appropriate herein.

[31] The record reveals that although on one occasion Rayl threatened to send a young worker to the shop, he did not do so. The record further establishes that the only written warnings given to employees for poor performance have been issued by Quinn.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time equipment operators employed by the Employer at and out of its Moundsville, West Virginia, facility; excluding mechanics, laborer, truck drivers, office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.[32] Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[33] Those eligible shall vote whether

[32] Pursuant to Section l03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to l2:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional Office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

[33] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and

or not they desire to be represented for collective bargaining by International Union of Operating Engineers, Local 132, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 16th day of March, 2000.

/s/Gerald Kobell
Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (l966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (l969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room l50l, l000 Liberty Avenue, Pittsburgh, PA l5222, on or before March 23, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.